

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

KEVIN B. OROPEZA

Defendant

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CRIMINAL ACTION NUMBER

IN-91-09-1732R1 IN-91-09-1733R1

IN-91-09-1734R1

ID NO. 91009357DI

Submitted: February 17, 2010

Decided: April 16, 2010

MEMORANDUM OPINION

*Upon Motion of the Defendant for
Postconviction Relief - **DENIED***

HERLIHY, Judge

On November 18, 1992, defendant Kevin Oropeza was convicted of one count of intentional murder in the first degree, one count of conspiracy first degree (to commit murder) and two counts of possession of a deadly weapon during the commission of a felony (PDWDCF). He appealed those convictions which were affirmed.¹ The mandate was issued November 17, 1993.

Oropeza, in a *pro se* motion filed February 12, 2010, has moved for postconviction relief. The motion presents several grounds for relief: (1) that the recent case of *Allen v. State*² should be applied retroactively to his case; (2) *Allen* mandates that for crimes of degree, where one is an accomplice, the jury must be instructed about that accomplice's individual culpability; (3) ineffective assistance of counsel for (a) not seeking an instruction under 11 *Del. C.* § 274, (b) not seeking an instruction on lesser included offenses, (c) introducing into evidence two "inconsistent" statements he gave to the police - noting he did not testify at trial, (d) allowing testimony of consumption of illegal substances and that he was on Pennsylvania parole, (e) allowing the medical examiner to testify about the effects of illegal drugs on him, (f) not objecting to the instruction on intoxication.

In addition, Oropeza has asked this Court to delay acting on his motion pending the Supreme Court's decision in *Richardson v. State*³ which he claims address the accomplice

¹ *Oropeza v. State*, No. 586, 1992 (Del. Supr. (ORDER) November 1, 1993).

² 970 A.2d 203 (Del. 2009).

³ CA. # 86, 2009 (Del. Supr.).

liability issue he raises. The Supreme Court had set that case for oral argument in February, but one of the massive February snow storms caused postponement of the argument until April 28, 2010. The Court has independently examined the defendant's brief in *Richardson* and finds the factual and legal setting substantially different from this case. Therefore, there is no need to postpone resolution of the issues Oropeza raises.

Factual Background

On the evening of September 15, 1991, Glen Proud, the eventual victim, started out in the company of his friend, William Wills. They went to a bar in Aston, Pennsylvania named Little Inn. That night Proud was wearing a blue denim jacket with Pagan "colors" on its back. Wills and Proud left and went to another bar, Bailey's in Chester Township. While there, Oropeza and Greg Anders, the co-defendant in the case, came into the bar. Wills knew Oropeza but not Anderson. He also said Oropeza knew Proud.⁴

A little later on, Oropeza, Anderson, Proud, and Wills went outside to smoke PCP. Following that, they all went back inside. Subsequently, Anderson, Oropeza, his girlfriend Grace Waters and Proud went to another bar, Boots and Bonnetts. Other testimony established Oropeza, along with others had been drinking beer a good part of the day prior to him showing up at the first bar. They were drinking at the above bars, too.

⁴ Proud's girlfriend testified that she last saw him on September 14th, and he had said he was going to meet Oropeza.

At some point Wills took Oropeza, Anderson, Waters, and Proud to Waters' apartment at the Brandywine Apartments just inside Delaware from Pennsylvania. Wills testified the ride was quiet. He detected no hostility by either Oropeza or Anderson during the drive to Brandywine Apartments. Proud wanted to go to continue to party.

Such an observation plays a role in this case because there was testimony Anderson had a very close friend who had allegedly been murdered by a member of the Pagans. There may have been an article in a paper on September 15th about which upset Anderson.

Wills left off the others at the apartment complex. A tenant at the apartments testified about what she saw:

Q. Okay. Now, you've testified that you heard a noise. You heard a noise when you got up because of your cough. What happened next?

A. Um, like I said, after I took my cough syrup I laid back down, and I still didn't drift off to sleep. And I still heard voices outside and they were getting a little louder. So I sat back up in my bed and I could look out my window and I saw scuffle outside.

Q. Now, what did you see when you looked out the window? What kind of scuffling?

A. Saw three guys scuffling around the parking lot and kicking and punching each other.

Q. Now, were all three guys involved with this scuffle?

A. Well, was two - - was two guys beating up one guy, one other guy.

* * * * *

Q. Okay. You've already testified you saw the three guys were all fighting and you also testified that there was some kicking going on.

A. Did one person seem to be the victim of the other two people?

A. Well, what I saw was the two blond haired guys were beating up on a dark haired guy.

Q. Now, before we go any further, you saw three people. Could you please describe the first person, any one person who was - - the person who was being hit?

A. The one with the dark hair, kind of long - - king of long hair was being hit.

Q. Okay. And the other two guys, could you tell any difference between their hair color?

A. One had very light blond hair, pretty light, and the other had a little darker blond.

Q. But could you tell a noticeable difference between the two hair colors?

A. Yeah.

Q. And now which of these two or were both them participating in this assault on the third person with long hair?

A. At first both of them were.

Q. Okay. Now, you stated that you saw kicking at some point. Did the victim fall down or how did you see the kicking part?

A. The victim fell, was on the ground at the time, you know, kicking and, evidently he had to have punched him to the ground and then they started kicking him at that point.⁵

Francis did not see either of the two assailants holding a weapon. She called 911 and later saw two men walking away to another area of the apartment complex.

⁵ Francis Trial Tr. at 246-49.

Another tenant, June Hudson, had been watching TV and dozing. She then described:

Q. Now, while you were watching TV or dozing off was there something that caught your attention?

A. Yes, I heard hollering outside.

Q. When you heard this hollering outside, what did you do?

A. I peeped out the window.

Q. And when you looked out your window, what did you see?

A. I saw a guy lying on the ground and a guy stabbing him and another guy out there.

Q. What was the other guy doing?

A. Standing off to the side telling them to stop and come on.

Q. How many times did you see this guy stabbing somebody?

A. Roughly about five I would say. Maybe more.

Q. And where on the victim's body were these stabs - - was the stabbing occurring?

A. Face and chest area.

Q. Did you see anything else in relation to - - I'm sorry. Strike that question.

How many weapons did you see?

A. Just the knife.

Q. And how many knives then did you see in the hand of the person doing the stabbing?

A. One.

Q. And what motion did you see with the knife?

A. What do you mean?

Q. What motion did you see? Was it a downward stabbing motion or - -

A. Yeah. Yes.

Q. Was he doing anything else with the knife?

A. He scraped it on the ground a couple of times, like scraped it after he stabbed him.

He kept saying, "You lied. You lied." He called him a - - a mother fucker. Kept saying, "You lied, mother fucker."

And he stabbed him and scraped it on the ground and stabbed him some more.

Q. And how many times did you see him scrape it on the ground?

A. Two times I would say.

Q. Now, how did you know he was scraping the knife on the ground?

A. I could see the scrape - - shiny sparks or something from the street.

Q. Now, earlier you testified that you heard hollering and that's what brought your attention - -

A. Uh-huh.

Q. What specifically did you hear any of these individuals say?

A. He kept saying over and over again, "You lied. You lied, mother fucker."

Q. And how many times would he have said, "you lied," if you can recall?

A. He said that most of the time that he stabbed him, that you lied.

Q. Now, could you please describe the person that you saw stabbing the victim?

A. He was about five five to five seven, dark hair, maybe a hundred and forty - - forty-five pounds. I - - I mean the weight I'm not for sure. I mean average weight.

Q. What was the distinguishing feature that - - about him that you are able to recall today? Is there anything in particular that would distinguish him from the other person?

A. Color of their hair. The other guy had blond, real light hair. Like I mean the guy's hair - - I don't know if it was brown or black or whatever, but it was dark. The other guy had blond hair.

Q. What was the blond haired individual doing as the brown haired person was repeatedly stabbing the victim?

A. He was standing off from him and he was in the grass acting like he was looking for something?

Q. Did you see anybody else out in that parking lot that night?

A. No.⁶

Co-defendant Anderson had at the time very light blond hair. Oropeza's hair was measurably darker.

⁶ Hudson Trial Tr. at 31-35.

Proud was stabbed twenty times in the chest, neck, and abdomen. Two stab wounds in the abdomen were very deep, severing the aorta causing him to bleed to death. The stab wounds in the neck were in the right and left side and there were four superficial stab wounds in the back. There was a stab wound on the right shin and small one near the armpit.

These were not the only wounds on Proud. He had blunt force wounds on the left ear and around the right and left eyes. Such wounds were consistent with punches. He had a separate set of incised wounds on the face and neck caused by a serrated knives being put on the on the skin pressed in and scraped across the face. There were, however, at least two different serrated knives used. The serrated edges on one knife were 1/32 inch apart and on the other 1/8 inch apart.

All of Proud's wounds were inflicted before he died. The two fatal wounds were angled from Proud's right to this left and downward around forty-five degrees.

The leg stab wound penetrated about two inches. There were abrasions and scrapings over both knees. There were no defensive wounds on Proud's hands or arms as is usually seen when someone is warding off a knife attack. The medical examiner classified the stab wound in the leg as defensive, as if someone were trying to fight off an attacker with his legs. The doctor also said with the number of incised wounds caused by the serrated knives, there was a lot of slashing, a lot of movement, and a lot of scraping of the knife blades across Proud's face.

During her direct testimony, the medical examiner was asked if PCP and alcohol were found in Proud's blood. They were. She described the hallucinogenic effects PCP has on a person who takes it. The amount in Proud's blood, which would have been unaffected by his death was, however, relatively small.

During its case-in-chief, the State played two videotaped statements Oropeza gave to the police. In the first, he said he knew Anderson only for a month and by his first name. He said he and Anderson had been drinking in a field that night (September 15th-16th). After that he walked with only Waters back to her apartment. Oropeza said he fell on some steps there. He offered this as an explanation for scraped left knuckles and the cut on his right forearm. During this taped interview, he admitted that he had "lied" during an earlier interview. The reason, he said, was that he was on parole on a burglary charge in Pennsylvania and was not allowed to leave the Commonwealth. He also said he was a little drunk at the moment he was talking to the police.

That statement was in the early morning hours shortly after Proud's body had been found. Oropeza gave a second taped interview two days later. In this interview Oropeza said Anderson pulled out two knives. He, Oropeza, tried to stop the fight and when doing so he got cut. At one point, all three of them fell to the ground. He then ran to Waters' apartment. He said Proud was sitting up. Since he had gotten blood on his clothes, he washed them; he also had blood on his hands from breaking up the fight. Five minutes after he was in Waters' apartment, Oropeza said, Anderson came in all bloody carrying two knives.

During the prayer conference, Oropeza's counsel asked for an instruction on murder second degree as a lesser included of murder first degree. The Court declined to give it. There was no objection lodged to the proposed instruction on intoxication. There was discussion about the accomplice liability instruction. Primarily the State noted it was arguing that Oropeza was the principal on the murder charge as well as one of the two charges of PDWDCF since there were at least two knives used to attack Proud. It argued Oropeza was an accomplice in the use of the second knife.⁷

Oropeza was convicted of murder in the first degree, conspiracy in the first degree and two counts of PDWDCF. These convictions were upheld on appeal. The only issue raised in his appeal seventeen years ago was this Court's failure to declare a mistrial. The basis for that claim arose from the denial of a motion Oropeza made at trial when one of the jurors becoming queasy during the display of the autopsy photos. The Supreme Court rejected that claim.

Discussion

Before undertaking consideration of the claims of Oropeza makes, the Court must determine if there are any procedural impediments to doing so.⁸ There is one obvious

⁷ Defense counsel asked the Court to give an instruction, under the rubric of *Probst v. State*, 547 A.2d 114 (Del. 1988), that the jury had to be unanimous on whether Oropeza was the murder principal or accomplice. Finding *Probst* inapposite, the Court declined to do so.

⁸ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

impediment. At the time his convictions became final, Oropeza had three years within to move for postconviction relief.⁹ The mandate from the direct appeal was issued November 17, 1993. Oropeza filed his motion February 12, 2010, clearly far beyond the three year limit.

Oropeza, however, can get relief from that bar if there is a right first recognized past the three years by the Delaware Supreme Court.¹⁰ He relies upon *Allen v. State*¹¹ as establishing a new right past the expiration of the three year bar. *Allen* was decided February 17, 2009. Oropeza filed his motion on February 12, 2010. In that sense, he meets a one year deadline. Oropeza can escape the three year or one year deadline by showing *Allen* first recognized a new right. One threshold issue is whether *Allen* is to be retroactively applied, and another is if *Allen* established a new right.

This Court in *State v. Travis*¹² held that (1) *Allen* recognized a new right, namely the need to instruct a jury in § 274 accomplice liability in a broader spectrum of cases - overturning many years of precedents to the contrary. The Court here sees no need to repeat the reasoning underlying its decision in *Travis* but adopts it as applicable to

⁹ Super. Ct. Cr. R. 61(i)(1); *Jackson v. State*, 654 A.2d 829 (Del. 1995), now one year from date conviction became final, a rule change which became effective for all convictions after July 1, 2005..

¹⁰ Super. Ct. Cr. R. 61(i)(1).

¹¹ 970 A.2d 203 (Del. 2009).

¹² 2009 WL 5928077 (Del. Super.).

Oropeza's motion. In sum, Oropeza, relies upon a right first recognized past the time bar of Rule 61(i)(1).

Allen, however, is inapplicable to Oropeza. The Supreme Court in *Allen* said Superior Court erred when it refused to give an instruction under 11 *Del. C.* § 274.¹³ The facts in *Allen* were that when Allen was a lookout during a string of commercial robberies and burglaries, and one of his co-defendants went inside each establishment with a gun. Allen was convicted of robbery in the first degree and burglary in the second degree.¹⁴ The Supreme Court said that since the aggravating factor was the gun in the co-defendant's possession and the crimes for which Allen was charged are divided into degrees, his own culpability and accountability had to be separately determined.¹⁵

Several important factors separate *Allen* from Oropeza. First, the evidence before the jury in this case was that he was the principal. The only two eyewitnesses describe him as the primary culprit, and he is the only one seen holding a knife. There was a marked physical difference between him with dark (or darker) hair and Anderson with

¹³ When, pursuant to § 271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance.

¹⁴ Usually in burglary in second degree involves entering a dwelling, but if the structure entered is a building and one participant had a deadly weapon, the crime is elevated from burglary in the third degree to burglary in the second degree. 11 *Del. C.* § 825(a)(2).

¹⁵ *Allen*, 970 A.2d at 213-214.

unmistakable very light blond hair. Jane Hudson puts Oropeza standing over Proud stabbing him at least five times and in areas at or near where the fatal wounds were inflicted. He was screaming at Proud that he, Proud, had lied. Oropeza had a cut on his forearm. There was uncontradicted evidence that at least two knives were used, and all the incised and twenty stab wounds were inflicted in temporal proximity and antemortem. Proud had none of the usual arm or hand defensive wounds. If anything was defensive it was a knee scrape and maybe a stab wound perhaps more consistent with using his legs to ward off the knife attack. Oropeza was seen punching Proud. He had scrapes on his hand. Proud had blunt force wounds, consistent with fists, to his ears and face.

Nor is this a case where a firearm is a deadly weapon that elevates the severity of the offense as in *Allen*.

In sum, even if *Allen* were to be applied retroactively, it is of no assistance to Oropeza. He cannot utilize any of the means of relief to the time bar to this particular claim.

Oropeza can also escape the time bar of Rule 61(i)(1) if he can show that this Court lacked jurisdiction or that there is a colorable claim of miscarriage of justice of a constitutional violation undermining the fundamental legality, reliability, integrity, or fairness of the trial. He has made no such claim for that relief from the time bar. In addition, the Court's discussion of the facts of this case, in light of *Allen*, further demonstrates there would be no basis for this means of relief to the time bar.

The balance of Oropeza's claims for postconviction relief fall under the umbrella of a claim of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, Oropeza must show (1) his attorney's performance fell below some objective standard and (2) prejudice.¹⁶ That means he must show that but for counsel's errors, the outcome of his trial would probably have been different.¹⁷

Oropeza again faces a procedural impediment to this Court's consideration of these claims. He makes them approximately sixteen years after his conviction became final. He had three years from November 1993 to present them and did not do so. They are barred.¹⁸ He can escape this bar by showing a right first recognized by either the Delaware or United States Supreme Courts after the expiration of the three years.¹⁹

None of Oropeza's claims, either standing on their own or considered as part of a claim of ineffective assistance of counsel come remotely close to establishing that a right was first recognized past November 17, 1996. They are, therefore, time barred.

Another relief to the time bar is if Oropeza can show that this Court lacked jurisdiction or he makes a colorable claim of a miscarriage of justice of constitutional

¹⁶ *Ayres v. State*, 802 A.2d 278, 281 (Del. 2002).

¹⁷ *Johnson v. State*, 813 A.2d 161, 167 (Del. 2007).

¹⁸ *Jackson v. State*, 962 A.2d 917; 2008 WL 4892732 (Del) (TABLE). *Supra* at 11-12.

¹⁹ Super. Ct. Cr. R. 61(i)(1).

dimension undermining the trial and his convictions.²⁰ Oropeza has made no such claim, nor is there anything in the specific claims he makes that rises closes to a colorable constitutional defect. For that reason, too, his claims of ineffective assistance of counsel are barred.

A brief examination of those claims underscores that result:

1. Counsel's failure to seek a § 274 instruction. That has been reviewed earlier.²¹
2. Counsel's failure to seek an instruction on lesser included offenses. Counsel did request an instruction on murder in the second degree. Neither the facts of this case or in *Allen* warranted such an instruction.
3. Counsel's introduction of two inconsistent statements Oropeza gave to the police. The *State* introduced the statements. The purpose was to show inconsistency between the two alone and also with other evidence in the case.
4. Counsel's allowing testimony of the consumption of PCP. There were several witnesses who testified about Oropeza's, Anderson's, Proud's, and other's consumption of PCP. It assumed a minimal role in the case. There was no evidence of PCP in Oropeza's blood as no blood samples were taken.
5. Counsel's allowing testimony that Oropeza was on parole from Pennsylvania. Oropeza offered this in one of his statements to the police to explain (a) he was not supposed to be in Delaware and (b) why he lied to the police in an earlier statement.
6. Counsel's failure to object to the Court's instruction on voluntary intoxication. There was a lot of testimony about Oropeza's drinking and his own statement to the police that he was a little drunk at the time he was giving his initial statement early in the morning of September 16th.

²⁰ Super. Ct. Cr. R. 61(i)(5).

²¹ *Supra* at 12.

7. Counsel's allowing the medical examiner to testify about the effect of PCP on Oropeza. The medical examiner offered no such testimony and testified about its effects when questioned about the PCP in the victim.

Again, these claims do not rise to the level of a miscarriage of justice. For all these reasons, Oropeza's claims of ineffectiveness are barred. And she said it would have had minimal effect on him.

Conclusion

For the reasons stated herein, defendant Kevin Oropeza's motion for post-conviction relief is **DENIED**.

IT IS SO ORDERED.

J.